

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOHN CARLISLE,

Petitioner,

v.

SCOTT RUSSELL.

Respondent.

CASE NO. C12-5439 BHS-JRC

REPORT AND RECOMMENDATION:

NOTED FOR: OCTOBER 19, 2012

The District Court has referred this petition for a writ of habeas corpus to United States Magistrate Judge, J. Richard Creatura. The authority for the referral is 28 U.S.C. § 636 (b) (1) (A) and (B), and local Magistrate Judge Rules MJR3 and MJR4. Petitioner seeks relief from a state conviction. Thus, the petition is filed pursuant to 28 U.S.C. § 2254.

Respondent has filed an answer and argues that the petition is time barred pursuant to the one-year statute of limitations set forth in 28 U.S.C. 2244 (d) (ECF No. 7). Respondent also argues that petitioner is not entitled to any form of equitable tolling (ECF No. 7). Petitioner did not respond or file a traverse. The Court recommends dismissing the petition as time barred.

DISCUSSION

Federal habeas corpus petitions are subject to a statute of limitations under the 1996 amendments to 28 U.S.C. § 2244 (d), as part of the Antiterrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C. § 2244 (d) provides as follows:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-

(A) the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

A. Facts.

Petitioner pled guilty to first degree robbery, first degree burglary, second degree assault, and unlawful possession of a firearm (ECF No. 8, Exhibit 1). A Pierce County Superior Judge sentenced petitioner to consecutive sentences with the longest sentence being 108 months. The Superior Court also imposed a mandatory 36 months firearm enhancement on the assault conviction which runs concurrent with all other sentences. Thus, the in custody portion of the sentence is 144 months (ECF No. 8, Exhibit 1). The Superior Court entered the sentence July 29, 2009 (ECF No. 8, Exhibit 1). This sentence was within the standard range. Petitioner had no right to appeal under state law. *See* RCW 9.94A.585 (1).

B. Procedural history and discussion.

Because there is no right to direct review, the judgment and sentence became final for habeas corpus statute of limitations purposes on the date they were entered, July 29, 2009.

1 Pursuant to 28 U.S.C.A. § 2244 (d) (1) (A), the limitation period begins on the date on which the
2 state court judgment became final by the conclusion of direct review or the expiration of the time
3 for seeking such review.

4 On July 28, 2010, petitioner filed a personal restraint petition in the Washington State
5 Court of Appeals (ECF No. 8, Exhibit 2). This tolled the running of the one-year statute of
6 limitations with two days remaining on the time for filing a federal habeas corpus petition. The
7 Washington State Court of Appeals denied the petition (ECF No. 8, Exhibit 5). Petitioner sought
8 discretionary review and the statute of limitation remained tolled pursuant to 28 U.S.C. § 2244
9 (d) (2), (ECF No. 8, Exhibit 6). This also tolled the running of the statute of limitations. The
10 Washington State Supreme Court Commissioner denied review (ECF No. 8, Exhibit 7).
11 Petitioner sought to modify that ruling (ECF No. 8, Exhibit 8), again, tolling the statute of
12 limitations. The Washington State Supreme Court denied the motion to modify the
13 Commissioner's ruling on March 7, 2012 (ECF No. 8, Exhibit 9). The two days remaining on the
14 one-year statute of limitation began to run the next day, March, 8, 2012. The last day for
15 petitioner to file a timely petition was March 9, 2012. The petition in this case was not filed until
16 May 17, 2012. Therefore, it is time barred.

17 Petitioner did not respond to the answer and has not argued or shown any entitlement to
18 equitable tolling.

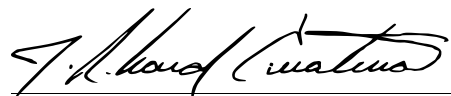
19 Therefore, the Court recommends dismissal of the petition as time barred and denial of a
20 Certificate of Appealability.

21 A petitioner seeking post-conviction relief under 28 U.S.C. § 2254 may appeal a district
22 court's dismissal of the federal habeas petition only after obtaining a certificate of appealability
23 (COA) from a district or circuit judge. A certificate of appealability may issue only if a
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petitioner has made “a substantial showing of the denial of a constitutional right.” *See* 28 U.S.C. § 2253 (c) (2). A petitioner satisfies this standard “by demonstrating that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (*citing Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Pursuant to this standard, this Court concludes that petitioner is not entitled to a certificate of appealability with respect to this petition.

Pursuant to 28 U.S.C. § 636 (b) (1) and Fed. R. Civ. P. 72 (b), the parties shall have fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of de novo review by the district judge. *See* 28 U.S.C. § 636 (b) (1) (C). Accommodating the time limit imposed by Fed. R. Civ. P. 72 (b), the clerk is directed to set the matter for consideration on October 19, 2012, as noted in the caption.

Dated this 27th day September, 2012.



J. Richard Creatura
United States Magistrate Judge